

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

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ERIC MYRIECKES,	:	
	:	
Plaintiff,	:	<u>MEMORANDUM & ORDER</u>
	:	
-against-	:	
	:	08 CV 4297 (GBD) (THK)
TERI WOODS, TERRI WOODS PUBLISHING,	:	
LLC, CURTIS SMITH,	:	
	:	
Defendants.	:	
	:	
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GEORGE B. DANIELS, District Judge:

Pro se Plaintiff Eric Myrieckes commenced this action against Defendant Teri Woods and Defendant Teri Woods Publishing, LLC asserting both federal copyright claims and state common law claims. Plaintiff alleges only state law claims for unjust enrichment and unfair competition against Defendant Smith. Defendant Smith moved for summary judgment. The court referred his motion to Magistrate Judge Katz for a Report and Recommendation (“Report”). Magistrate Judge Katz issued a Report recommending that Defendant Smith’s motion for summary judgment be granted. The Court adopts the Report’s recommendation that Defendant Smith’s motion for summary judgment be granted, dismissing the state law claims against him with prejudice.

The Court may accept, reject or modify, in whole or in part, the findings and recommendations set forth within the Report. 28 U.S.C. § 636(b)(1). When there are objections to the Report, the Court must make a de novo determination of those portions of the Report to which objections are made. Id.; see also Rivera v. Barnhart, 423 F. Supp. 2d 271, 273 (S.D.N.Y. 2006). The district judge may also receive further evidence or recommit the matter to the

magistrate judge with instructions. See Fed. R. Civ. P. 72(b); 28 U.S.C. § 636(b)(1)(c). It is not required, however, that the Court conduct a de novo hearing on the matter. See United States v. Raddatz, 447 U.S. 667, 676 (1980). Rather, it is sufficient that the Court “arrive at its own, independent conclusions” regarding those portions to which objections were made. Nelson v. Smith, 618 F.Supp. 1186, 1189-90 (S.D.N.Y. 1985) (quoting Hernandez v. Estelle, 711 F.2d 619, 620 (5th Cir. 1983)). When no objections to a Report are made, the Court may adopt the Report if “there is no clear error on the face of the record.” Adee Motor Cars, LLC v. Amato, 388 F. Supp. 2d 250, 253 (S.D.N.Y. 2005) (citation omitted).

Magistrate Judge Katz determined that the state law claims plaintiff asserted against Defendant Smith were preempted by federal copyright law. The magistrate judge found that the plaintiff’s claims satisfied the two prong “subject matter requirement” and “general scope requirement” test used to determine preemption issues in copyright infringement cases. Therefore, Defendant Smith’s alleged acts, which are the basis of plaintiff’s claims, essentially state an infringement claim on one of the exclusive rights protected by federal copyright law.

Magistrate Judge Katz concluded that plaintiff’s allegation, that Defendant Smith knowingly confused consumers, was not an extra element which would alter the nature of plaintiff’s copyright infringement claim. Id. at 10. Plaintiff’s argument is predicated on a theory of reverse passing off, which itself is a disguised copyright infringement claim, and, consequently, preempted. Lastly, the magistrate judge found that plaintiff would be unable to restate his claim to avoid preemption, and therefore, plaintiff’s claim should be dismissed with prejudice. Id. at 13.

In his report, Magistrate Judge Katz advised the parties that failure to file timely objections to the Report would constitute a waiver of those objections. See 28 U.S.C. §

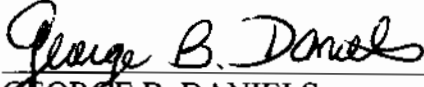
636(b)(1); Fed. R. Civ. P. 72(b). Plaintiff timely filed objections to the Report, titled “Opposition of Report and Recommendation.” Plaintiff objects to the Report’s sua sponte dismissal of plaintiff’s claims against Defendant Smith on the basis of preemption.

After conducting a de novo review of the portions of the Report to which objections were made, the record, and the relevant case law, the Court adopts those portions of the Report. With respect to those portions of the Report to which plaintiff did not specifically object, the Court finds the record is not facially erroneous.

Accordingly, the Court adopts the Report in its entirety. Defendant Smith’s summary judgment motion is granted. Plaintiff’s state law claims are dismissed with prejudice as to Defendant Smith.

Dated: New York, New York
March 31, 2009

SO ORDERED:



GEORGE B. DANIELS
United States District Judge